

IN THE SUPREME COURT

STATE OF MICHIGAN

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MAR 2003

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Appeal from the Michigan Court of Appeals
Richard A. Bandstra, C.J.; Hilda R. Gage, JJ.; and E. Thomas Fitzgerald, JJ.,
Presiding Concurring and Dissenting Opinion by Richard A. Bandstra, C.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

Supreme Court No. 121189
Court of Appeals No. 225855
37th Circuit Court No. 84-2098 FC

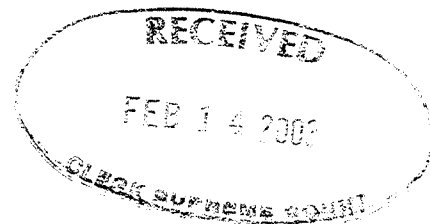
THOMAS DAVID CRESS

Defendant-Appellee

BRIEF *AMICUS CURIAE*

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS CRIMINAL DEFENSE
ATTORNEYS OF MICHIGAN**

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INTRODUCTION

The National Association of Criminal Defense Attorneys (“NADCL”) and the Criminal Defense Attorneys of Michigan as *amicus curiae* present the following brief in support of Thomas Cress.

Thomas Cress has been in jail for over sixteen years for the murder of Patricia Rosansky, which he did not commit. Convicted murderer-rapist Michael Ronning has confessed to the murder for which Cress is incarcerated and one of the prosecution’s key witnesses, whose testimony was the only substantive evidence against Cress, has since stated that they falsely testified that Cress confessed to them in order to collect reward money. In addition, several months after Calhoun County Prosecutor Jon Sahli first learned that Ronning had confessed to the killing of Patricia Rosansky, he signed an order authorizing the destruction of all the physical evidence from the Cress investigation. This potentially exculpatory evidence contained spermatozoa that had never been DNA tested, two pubic hairs that had never been compared to any known sample, and an unknown hair sample that was found in the victim’s hand. As disturbing as the facts surrounding the destruction of evidence are, the Court of Appeals was correct in ordering a new trial regardless of whether Sahli acted in bad faith when he ordered the evidence destroyed.

STATEMENT OF FACTS

Patricia Rosansky disappeared on February 3, 1983. (T 3/19/85 166-172).¹ Her body was found on April 6, 1983, in the woods near Battle Creek and it was evident that she had been sexually assaulted.. (T 3/15/85 195-198). Thomas Cress was arrested after Cindy Leslie, her sister, Candy Moore, and Moore's incarcerated husband, Walter Moore, went to the police after a local TV station ran a program offering a \$5,000 reward for information leading to the arrest of Ms. Rosansky's murderer. (T 3/28/85 221; 4/2/85 47; 4/3/85 183-84). Leslie collected the reward money. (T 4/3/85 199). At trial, no physical evidence linked Cress to the murder, (12/3/97 Opinion at 7, Appendix D), and Cress presented an alibi defense, confirmed by his delivery partner and circulation manager, that he was delivering papers during the morning of February 3, 1983, (T 4/18/85 1126-28; T 4/16/85 862-66). He was convicted largely on the testimony of two witnesses who were paid \$5,000 for their "information" claiming Cress told them he had committed the murder. (12/3/97 Opinion at 7, Appendix D).

Since the trial, new evidence shows that someone else killed Patricia Rosansky. In 1997, Michael Ronning confessed to three Calhoun County murders that occurred in late 1982 or early 1983 and signed an affidavit on October 31, 1997, stating that he murdered Patricia Rosansky. (T 11/5/97 93-94, 166; T 11/5/97 91; Ronning Affidavit, Appendix H). Ronning took and passed a polygraph test in which he was specifically asked if he committed the three murders. People v. Cress, 250 Mich. App. 110, 116 (2002). Also that year, Thomas Cress took and passed a polygraph test indicating that he had not committed the murder of Ms. Rosansky. *Id.* at 137. Furthermore, in a videotaped interview, Candy Cross (formerly Moore), a key prosecution witness at trial, admitted that Cress never confessed he had killed anyone to her. (T 12/4/98 130, 200-02; 12/9/98 [a.m.] 146). She also said that she believed her sister, Cindy Leslie, set Cress up

¹ Citations to the record will be in the form of the transcript date followed by page numbers.

for the reward money. (T 12/4/98 202-03; 12/9/98 [a.m.] 69).

In 1983, Detective Dennis Mullen was assigned to investigate the 1982 murder of another woman, Maggie Hume. (T 12/3/98 50-52). During the investigation, he discovered that a convicted rapist, Michael Ronning, lived in the apartment beneath Ms. Hume and that Ronning moved out the day Ms. Hume disappeared. (T 12/3/98 50-52). He also noticed that Ronning lived near three other young women who had been murdered, including Patricia Rosansky. (T 12/3/98 55). Det. Mullen also discovered that in 1983, Ronning moved to Texas and shortly thereafter, the girlfriend of the man with whom he was staying disappeared and was later found dead in woods shortly after Ronning moved out. (T 12/3/98 50, 52, 57). After learning that Ronning was serving a life sentence in Arkansas for kidnap, rape, and murder, Det. Mullen visited Michael Ronning in 1987. (T 12/3/98 75, 76, 79). Ronning refused to divulge information without an attorney. (T 12/3/98 91). Det. Mullen visited him again on January 6 and 7 of 1992, when Ronning insinuated that he had committed murders in Michigan and that he could clear the man who had been wrongfully convicted of the Rosansky murder. (T 12/3/98 92; Detective Mullen Report, Appendix I). He indicated that he would confess to the murder if he could serve his life sentence in Michigan. (T 12/3/98 124-25). Det. Mullen had this information passed on to Calhoun County Prosecutor Sahli. (T 12/3/98 168-69; Det. Mullen Report at 1, Appendix I). Sahli agreed to look into making a deal in exchange for Ronning's cooperation. (T 12/4/98 168-69).

On January 27, 1992, Sahli met with Det. Mullen and Commander Joe Newman to discuss Michael Ronning. (T 12/4/98 172, 175). Because no action was taken, Det. Mullen contacted Prosecutor Sahli on February 14, 1992. (T 12/4/98 176). Prosecutor Sahli stated that he would assign the matter to an assistant but no progress was made. (T 12/4/98 176-80). Det.

Mullen constantly brought up Ronning when he contacted the prosecutors. (T 12/4/98 184). On April 28, 1992, Battle Creek Police Chief Pope telephoned Sahli regarding the delay in the Ronning matter and Sahli told him that action would be taken. (T 12/4/98 182).

After five months of discussions the Calhoun County Prosecutor's Office finally did do something. It destroyed the physical evidence of the murder of Patricia Rosansky. On May 14, 1992, Prosecutor Sahli ordered the destruction of all the physical evidence obtained during the investigation of the Rosansky murder. (Prosecutor's Authorization to Destroy Evidence, Appendix J). When he did so, Sahli was well aware that Det. Mullen believed that Ronning was guilty and Cress was innocent of the Rosansky murder. Several facts proven at an evidentiary hearing, held on August 8 and 8, 2002 in the trial court, confirm Sahli's knowledge about Det. Mullen's beliefs. First, both Det. Mullen and Commander Newman each testified that they spoke with Shali about Ronning's involvement in the murder (Appellee's Appendix, 417b, 421b). Each testified that they were present at an August 22, 1992 meeting with Mr. Hall and that Ronning's involvement in the murder was discussed in the presence of Sahli (Appellee's Appendix, 418b-419b, 421b.) A note found on the Cress's in pro per motion for trial transcripts, see (Appellee's Appendix, 57b), written in part by Sahli's secretary, Shirley Lawcock, and dated May 12, 1992, contained the this notation: "Matt, this is an old murder case. He has been the whole route, supreme court, denied. Jon said someone should be there." Ms. Lawcock testified that the "Jon" was Prosecutor Jon Sahli (Appellee's Appendix, 422b).

The evidence that was destroyed contained potentially exculpatory DNA evidence as well as other key evidence introduced at the original trial of Thomas Cress including:

1. One kotex pad of the victim containing spermatozoa;
2. Two pubic hairs never compared to any known samples;
3. Unknown hair sample located in victim's hand;
4. Victim's clothing;

5. Numerous photographs of the scene of the crime;
6. All of defendant's trial exhibits.

Any or all of this evidence could have been used to corroborate Michael Ronning's confession and to exculpate Thomas Cress.

After the August, 2002 evidentiary hearing, the trial court concluded that Prosecutor Sahli did not act in bad faith when he ordered the evidence destroyed.

ARGUMENT

I. THE COURT OF APPEALS DECISION GRANTING THOMAS CRESS A NEW TRIAL SHOULD BE AFFIRMED REGARDLESS OF THE PROSECUTOR'S STATE OF MIND WHEN HE ORDERED THE PHYSICAL EVIDENCE DESTROYED.

Prosecutor Jon Sahli ordered the destruction of all physical evidence relating to this case. Since Thomas Cress was convicted of Patricia Roasansky's murder sixteen years ago, new evidence strongly points to his innocence. This new evidence includes a convicted murderer's confession to the crime, as well as the recantation of one of the prosecution's primary witnesses. The destroyed evidence, especially when viewed in conjunction with these new facts, warrants a new trial, regardless of the intent of the state actor who ordered it destroyed. Therefore, the Court of Appeal's decision to reverse Cress's conviction should be affirmed.

A. In light of the overwhelming evidence of Cress's innocence, and because the physical evidence could have officially exonerated Cress, the Court of Appeals decision granting Cress a new trial must be affirmed.

Because "no physical evidence connected [Cress] to the victim's murder and no eyewitnesses observed any involvement by [Cress] in the victim's murder," the Court of Appeals found it difficult to "imagine a scenario that would constitute a more appropriate basis for an order granting a new trial." People v. Cress, 250 Mich. App. at 158. The Court reversed Cress's conviction due to several trial court errors, including the trial court's failure to consider

Ronning's confession, failure to consider Ronning's polygraph results, failure to consider the fact that several witnesses may have perjured themselves, and failure to give proper weight Det. Mullen's belief that Ronning murdered Ms. Rosansky. Finally, the Court of Appeals held that because the "the prosecutor's destruction of evidence was highly relevant to the issue whether defendant should receive a new trial" the trial court erred in failing to consider that issue. *Id.* at 154.

The Court of Appeals found the destruction of evidence "deeply disturbing" and held that bad faith could be inferred from the surrounding facts. *Id.* Such an inference is unnecessary, however, because while the Prosecutor's state of mind is one factor recommending reversal, the fact that such important evidence was destroyed is alone enough to warrant a reversal. In this case, the destroyed evidence was important on at least two accounts. First, testing could have been used to exonerate Cress. Second, that same testing could have confirmed Ronning's confession.

It is undisputed that no physical evidence linked Cress to the murder of Ms. Rosansky. However, physical evidence existed that, with modern testing, could have linked someone to the crime. This evidence included the hair with intact follicles and spermatozoa. The timing of the destruction, combined with the testimony of Detective Mullen, Commander Newman and Keith Hall, Ronning's Arkansas attorney, that they informed the prosecutors that Ronning was implicated in the murder of Ms. Rosansky before the evidence was destroyed, as well as testimony from the original prosecutor on the case that he knew Detective Mullen suspected Ronning in the 1980's, would certainly allow, if not compel, a jury to infer that the destroyed evidence would have been unfavorable to the state's case. At the very least Cress should be "free

to argue to the finder of fact that [the evidence] might have been exculpatory[.]” Arizona v Youngblood, 488 US 51, 59; 109 S Ct 333; 102 L Ed 281 (1988).

The other new evidence of Cress’ innocence enhances the exculpatory nature of the physical evidence at issue. Ronning’s confession and the recantation of the prosecution’s main witness ground the destruction of the physical evidence in an important context. As the Court of Appeals held, these factors alone warrant a new trial; considering the evidence destruction against their backdrop catapults this case squarely within the “class of cases where the interests of justice most clearly requires” a new trial. *Id.* at 58.

B. Although Michigan has not settled on a standard for evaluating failure to preserve evidence claims, under any existing test, Thomas Cress’s reversal must be upheld.

Michigan should adopt a balancing test for evaluating claims that the state has failed to preserve evidence. This test, adopted by many states, would place the proper burden on defendants and allow courts to weigh the totality of the circumstances surrounding the state’s failure in order to seek justice. However, should this Court choose to adopt the more rigid Youngblood test, the Court of Appeals decision reversing Cress’ conviction should still be affirmed.

i. *Michigan should adopt a balancing test for evaluating claims that the government has destroyed evidence.*

Apart from the rare case where the interest of justice requires otherwise, the federal constitutional standard in failure to preserve evidence claims recognizes a due process violation when “a criminal defendant can show bad faith.” Youngblood at 58 (the police did not violate defendant’s right to due process when they negligently failed to refrigerate clothing and to perform tests on semen samples because there was no evidence of bad faith). However, the

balancing test adopted by several of Michigan's sister states should be adopted instead of Youngblood's bad faith requirement.

First, it is extremely difficult to prove bad faith without even considering the materiality of the missing evidence or its effect on the defendant's case. Even where loss of evidence was due to ineptitude or some explanation short of anti-defendant animus, that evidence loss may well be constitutionally. See id. (Blackmun, J., dissenting, joined by Brennan and Marshall, JJ.). In addition to the federal bad faith requirement's failure to weigh materiality, the inherent difficulty in proving bad faith poses an undue burden on defendants whose due process rights have been violated by the inability to present potentially exculpatory evidence. See e.g., State v Ferguson, 2 SW3d 912, 916 (Tenn, 1999). The concern is that, as Justice Stevens who concurred in Youngblood's judgment but not in the majority opinion, predicted, the Youngblood rule is too broad in a case where "the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." Youngblood, 488 US at 61.

States explicitly rejecting the United States Supreme Court's standard of due process for destruction of evidence in Youngblood favor a pragmatic balancing test weighing the following factors: "(1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial." State v Delisle, 648 A2d 632, 643 (Vt, 1992).² Thus, courts can consider not only the bad faith of the

² Other state courts adopting a balancing test under their respective constitutions and rejecting Youngblood include: State v Ferguson, 2 SW3d 912 (Tenn, 1999); State v Osakalumi, 461 SE2d 504 (W Va, 1995); State v Morales, 657 A2d 585 (Conn, 1995); People v Hopley, 637 NE2d 992 (Ill, 1994); Ex parte Gingo, 605 So 2d 1237 (Ala, 1992); Commonwealth v Henderson, 582 NE2d 496 (Mass, 1991); State v Matafew, 787 P2d 671 (Hawaii, 1990); Thorne v Dept. of Pub. Safety, 774 P2d 1326 (Ala, 1989); Hammond v State, 569 A2d 81, 87 (Del, 1989); Osuch v State, 976 SW2d 810 (Tex App, 1998); People v Burch, 247 AD2d 546 (NY2d Dept, 1998); Gurley v State, 639 So 2d 557 (Ala Crim App, 1993).

State supreme courts adopting the Youngblood bad faith standard for the destruction of evidence include: People v Roybal, 966 P2d 521 (Cal, 1998); Steese v State, 960 P2d 321 (Nev, 1998); State v Smith, 922 P2d 811

government, but also the materiality of the unavailable evidence and the prejudice to defendant in determining whether a due process violation has occurred. See e.g., Ferguson, 2 SW3d at 917 (the state has a duty to preserve material evidence that possesses “an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means”).

Second, because no Michigan court has expressly adopted the Youngblood analysis for destruction of evidence, it is well within this Court’s power to broaden the scope of protection for defendants under Michigan’s Due Process Clause by adopting this test. The fact that Michigan courts have interpreted Michigan’s Due Process Clause to provide for the same protections as those under the U.S. Constitution in other contexts is not dispositive. Courts “may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection.” Sitz v Dept of State Police, 443 Mich 744, 759; 506 NW2d 209 (1993) (relationship between Const 1963, art 1, § 11 and the federal Fourth Amendment). The Michigan Constitution may be interpreted to afford greater protection than the U.S. Constitution if “there is a compelling reason” to do so. People v Perlos, 436 Mich 305, 313 n. 7; 462 NW2d 310 (1990).

This “compelling reason” test requires a “searching examination to discover what law ‘the [Michigan] people have made.’” See Sitz, 443 Mich at 758-59 (quoted in People v Reichenbach, 459 Mich 109, 119; 587 NW2d 1 (1998)). In conducting that search, structural differences between the Michigan and federal provisions, peculiar to state or local interests in Michigan warranting a different level of protection, and the concerns embodied in the enactment of the two provisions are salient considerations. Cf. Reichenbach, 459 Mich 119-20.

(Wash, 1996); State v Vickers, 885 P2d 1086 (Ariz, 1994); Collins v Commonwealth, 951 SW2d 569 (Ky, 1997); State v Drdak, 411 SE2d 604 (NC, 1992); State v Dulaney, 493 NW2d 787 (Iowa, 1992).

Structurally, the differences between the two due process provisions lie in the placement of the due process passage with respect to other passages. The language itself is identical. However, special interest in preventing injustice to innocent defendants in Michigan is important. In 1846, Michigan was the first English-speaking jurisdiction in the world to outlaw the death penalty, and one of the reasons cited in a Michigan legislature committee report was “instances of where, on incorrect evidence, innocent men have been convicted, sentenced and executed.” Eugene G. Wanger, “Historical Reflections on Michigan’s Abolition of the Death Penalty,” 13 TM Cooley L Rev 755 (1996) (quoting Michigan Legislature of 1844, Majority Report of the Select Committee on the Abolishment of Capital Punishment, at 5 (Detroit, State of Michigan 1844)). The bar on the death penalty continues in Michigan today and is now contained in the Michigan Constitution. See Const 1963, art 4, § 46 (“No law shall be enacted providing for the penalty of death.”). At the 1961 Constitutional Convention in Michigan, among the arguments convincing the delegates, who voted 141 to 3 to add the banning provision to the Michigan Constitution, again was the strong desire to avoid the possibility of executing innocent people. See Raymond Bonner and Ford Fessenden, “States With No Death Penalty Share Lower Homicide Rates,” N.Y. Times, Sept. 22, 2000, A1, A19, at A19.

The law that the people of the state of Michigan have made is fundamentally embodied in this fixture of state culture and demonstrates a “compelling reason” that the balancing approach to destroyed evidence should be adopted over the bad faith approach. Of course the other forty-nine states and the federal government share the values embodied in the rights designed to prevent the innocent from erroneous conviction, incarceration and/or execution. But the interest in protecting innocent defendants is uniquely special to Michigan, as demonstrated by its long-standing commitment to prohibit the death penalty. This interest supports the conclusion that the

right to present an effective defense to criminal prosecution under the Michigan Due Process Clause requires consideration of the materiality of evidence, albeit in a balancing approach, in the state due process determination where the government is in some way responsible for loss of potentially exculpatory evidence.

Finally, as this case shows, public policy compels the use of such a balancing test. When evidence is destroyed before the defendant has a proper chance to test it there is a high probability that “fundamental fairness” has not been met, regardless of the prosecutor’s intent in destroying the evidence. When other new evidence was withheld from a defendant which would likely have led to the testing of the destroyed evidence, “fundamental fairness” has been further disturbed, regardless of intent. Allowing a court to consider facts such as these in deciding how to approach evidence destruction ensured that the guarantees of the Constitution are protected. The intent of the state actor who ordered the evidence destroyed should not be determinative – even if the prosecution had the best intentions, when so much other evidence points to innocence, the court must be able to pursue justice. A balancing test allows for this.

Under the three factor balancing approach, the state has violated Thomas Cress’ due process rights. The first factor is the bad faith or negligence of the prosecutor in destroying the evidence. Although the trial court found no bad faith by Sahli, such destruction was certainly negligent. Sahli had notice that the police believed that someone else had committed the murder, that that individual had confessed, and that Cress intended to file a motion for a new trial. The evidence destroyed was the only physical evidence available in a case that deserved further attention. Second, a court must consider the importance of the evidence. The importance of the DNA evidence in this case is unquestionable as it could have exculpated Thomas Cress, and conclusively linked a confessed killer to the murder. There was no other evidence linking Cress

to the crime – only the testimony of witnesses who had received reward money for their “information.” Finally a court should consider the strength of the other evidence available. Again, the weak evidence leading to his conviction at trial in 1985 consisted of no physical evidence and testimony by witnesses who were paid, one of which has recanted her testimony. (T 12/4/98 200-03; 12/3/97 Opinion at 7, Appendix D). Under this standard Cress has been deprived of due process of law owed him under Michigan’s Constitution due to the destruction of evidence.

ii. Because the interest of justice requires it, Thomas Cress deserves a new trial even under a Youngblood analysis.

Under the exceptional circumstances in this case, the prosecution had a duty to preserve the evidence for further testing, regardless of the state of mind of the state actor who ordered it destroyed. If this Court requires a finding of bad faith, the facts of this case provide one.

a. In light of the exceptional circumstances in this case, the destruction of the evidence requires a new trial, regardless of the intent of the prosecutor who ordered it destroyed.

While the Youngblood court settled on bad faith as a necessary element in evaluating most evidence destruction due process claims, it did not do so in a vacuum. Quoting California v. Trombetta, 467 U.S. 479 (1984), the Youngblood Court emphasized two additional factors which give important context to the loss of evidence. Specifically, in addition to bad faith, the Court inquired about the chances of lost evidence exonerating the defendant and whether the defendant had other means of demonstrating innocence. *Id.* at 55.

In this case, an evaluation of these additional factors is sobering. In light of modern DNA testing, there is an extremely high chance that preserved samples would have exculpated Cress. The chance that this would have been the outcome is greatly increased by the fact that a known

murderer had confessed to the crime, and the prosecution's witness had recanted. Additionally, Cress has no alternative means of conclusively demonstrating his innocence. The destroyed evidence was the only evidence that could have officially exonerated him by eliminating him as a suspect and confirming Ronning's confessed involvement. While the government's burden to retain evidence is limited where there is no bad faith, in this case – where the physical evidence has not been through modern testing, where no other physical evidence links the defendant to the crime, where witnesses have admitted they lied, and where another known murderer has confessed – and where the government was aware of these facts, the government's burden must be heightened. Given these exceptional circumstances, the Court of Appeals decision to reverse Cress' conviction should be affirmed regardless of the intent of the state actor who ordered the evidence destroyed

b. The trial court erred in finding that the Prosecutor who ordered the evidence destroyed did not do so in bad faith.

At the time he ordered the destruction of the physical evidence, Prosecutor Sahli knew that Thomas Cress might be innocent and that Michael Ronning was suspected of, and had admitted to, the rape and murder of Patricia Rosansky, as well as other rape-murders in Michigan. Having been briefed by Det. Mullen about his investigation, Sahli was well aware that the physical evidence in the Rosansky case, stored by the State Police, was extremely important. Sahli must have known that the nature of the physical evidence in a case of murder and rape might lend itself to scientific analysis not available at the time of the 1985 trial which could exculpate Cress and corroborate Ronning's confession. At the time the evidence was destroyed, many sentenced prisoners were petitioning courts to permit tests to be performed on preserved

samples. See, Development in the Law, Confronting the New Challenges of Scientific Evidence, 108 Harv L R 1481, 1571 (1995). Therefore, in destroying the spermatozoa found on the victim's kotex pad, the prosecution destroyed evidence that it knew was at the very least "potentially useful" evidence under Youngblood.

After an evidentiary hearing, the trial court found that the prosecution did not act in bad faith when it destroyed the physical evidence. The court found that Prosecutor Sindt, not Sahli, handled Cress's case, and therefore Sahli had no knowledge that Cress may have been wrongfully convicted. (8/16/02, Circuit Court Opinion, p. 24). Additionally, the court found that the destruction of evidence was instigated by the state police, who were in search of more storage space, and not by Sahli. *Id.* These findings were in error.

The prosecution's bad faith can be measured by evaluating factors including notice that the evidence is potentially exculpatory, objective evidence of the exculpatory value, the government's ability to control the destruction of the evidence, the centrality of the evidence to the government's case, and any innocent explanations for the government's conduct that are reasonable under the circumstances. See United States v. Bohl, 25 F.3d 904, 911 (1994). In this case, an evaluation of these factors is illuminating. Det. Mullen and Commander Newman indicated that Sahli had notice that another person had confessed to the crime. (Appellee's Appendix, 411b-412b). Prosecutor Sindt confirmed that his office had knowledge of Det. Mullen's efforts and beliefs about Ronning's confession. (Appellee's Appendix, 433b). The fact that the prosecutor's office had sought Ronning's blood samples in connection with another murder indicates that they were aware of the importance of such testing. (Appellee's Appendix, 414b). The government alone controlled the destruction of the evidence. As the only physical evidence in the case, it was central to the government's case.

Additionally, the trial court erred in crediting the innocent explanation offered by the Sahli. Although the Michigan State Police form request for authorization to destroy evidence appears to have come to Sahli as a matter of course, the question of who initiated the decision to destroy the evidence is not relevant. The important inquiry should be whether Prosecutor Sahli arranged for the destruction with knowledge that it had potentially exculpatory value to Thomas Cress. Thus, Prosecutor Sahli's stated reason for destroying the evidence, "closed no appeal," Prosecutor's Authorization to Destroy Evidence, Appendix J, should have little weight, if any, in favor of a finding of good faith, especially when he knew that Ronning confessed to the murder, that the police believed the wrong man had been convicted, that a pattern of similar homicides had been committed by Ronning, and that, under Michigan law, a motion for a new trial could be filed at any time. See MCR 6.502. Sahli had potentially exculpatory evidence destroyed deliberately, knowingly, and in direct contravention of every duty he had as a prosecutor for the State of Michigan.

Finally, the trial court failed to address two crucial and undisputed facts regarding the destroyed evidence. First, Sahli was aware on or about May 12, 1992 that Cress filed a motion seeking trial transcripts in order to file a 6.500 motion. This knowledge is evidenced by the yellow sticky note found attached to the motion, written by Sahli's secretary, that indicated Sahli had requested someone be present at the hearing. Secondly, Conrad Sindt, the prosecutor who originally handled Cress' case, testified that Detective Mullen told him in the late 1980's that Ronning might have killed Ms. Rosansky. Sindt failed to inform the State Police, Cress, or Cress' attorneys of this information. These two facts alone combined with the destruction of evidence indicate bad faith – the prosecutor's office knew there was another suspect; the specific prosecutor who ordered the destruction of the evidence knew that Cress was planning to continue

seeking justice in his case. Finally, Sahli could say that he routinely ordered evidence destroyed when requested to do so by the state police; Sahli had refused to sign other authorizations to destroy evidence (Appellee's Appendix, 426b). And as the State Police Post Commander testified, it would have been inappropriate to destroy evidence if questions about the guilt of the defendant had been raised, or if the prosecutor knew that a new trial motion was being filed. (Appellee's Appendix, 427-238b). Given all of these facts the trial court erred in finding that the order to destroy the evidence which could have officially exonerated Thomas Cress was not made in bad faith.

CONCLUSION

This court should adopt a balancing test for handling the destruction of evidence that allows a court to consider the totality of the circumstances in pursuit of justice. A requiring of a finding of bad faith, as suggested in Youngblood, is too burdensome on defendants and does not do enough to seek justice. In this case, the trial court erred in finding no bad faith on the part of the prosecution in ordering the evidence destroyed, but given the overwhelming amount and nature of the newly discovered exculpatory evidence, the Court of Appeals decision to reverse Thomas Cress's conviction must be upheld.

Respectfully Submitted,

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